

The Examiner's observations are not correct. We therefore respectfully request consideration of the two briefs currently in effect: the 15 April 2004 Corrected Appeal Brief and the 2 May 2005 Supplemental Appeal Brief.

The 2 May 2005 Supplemental Appeal Brief identifies claim 3 as one of the appealed claims. It expressly argues for patentability of claim 3. It states, "Patentee elects to stand on the previous brief because we do not believe that in reopening prosecution the Examiner has identified any truly-new grounds for rejection, other than with respect to claim 3." It then goes on to state, "As for claim 3, the Examiner for the first time rejects it under Section 103(a), allegedly finding the presence of all elements in the same prior art combination applied against most of the other claims. The Examiner is wrong." Thus, the 2 May 2005 Supplemental Brief identifies claim 3. It incorporates by reference the previous 15 April 2004 Corrected Appeal Brief (which lists claim 3 as an appealed claim), and also separately argues for the patentability of claim 3.

### **Other Issues**

Applicant endeavors to clear up some potential uncertainty about which appeal rules apply. Applicant notes that this appeal is 2 ½ years old. The first brief was filed in November 2003, and the Corrected Brief was filed in April 2004. In each case, the appeal brief fell under the old rules for appeal briefs (in effect until September 2004).

In addition, Applicant notes that at the time the Examiner reopened prosecution on 28 February 2005, the MPEP did not require a complete new brief to reinstate the appeal. The MPEP in effect at that time was the 8<sup>th</sup> Edition, 2<sup>nd</sup> Revision. This revision

permitted a "supplemental brief" for purposes of reinstating an appeal after re-opened prosecution. Thus, at the time we presented our 2 May 2005 response, no new complete brief was required. That requirement only came into existence in August 2005, with the publication of the MPEP Eight Edition, 3<sup>rd</sup> Revision.

### **Conclusion**

Applicant respectfully requests withdrawal of the requirements in the 13 January 2006 Communication, and further processing of this appeal. You are authorized to charge any fees to the undersigned's deposit account (#14-1131).

Respectfully submitted,

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